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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 364

ALBERT SMITH, PETITIONER

V.

JOSEPH O'GRADY, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA, RESPONDENT.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI

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October Term, 1940

No. 364

ALBERT SMITH, PETITIONER

V.

JOSEPH O'GRADY, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA, RESPONDENT.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI

WALTER R. JOHNSON,
Attorney General of Nebraska

H. EMERSON KOKJER,
C. S. BECK,
CHARLES F. BONGARDT
Assistant Attorneys General
of Nebraska.
Counsel for Respondent.

To The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Your respondent respectfully shows:

The petitioner in this case, Albert Smith, is asking that a writ of certiorari issue out of this court to review a

judgement of the Supreme Court of Nebraska entered in the above cause on June 3, 1940, affirming a judgement of the District Court of Lancaster County, Nebraska, dismissing a petition for a writ of habeas corpus on the ground that petitioner failed to state a cause of action.

The case involves no question of national or sectional importance, nor any remote Federal question, nor any inter-court conflict as to the law. It involves merely a question of Nebraska law, decided adversely to Petitioner by the Supreme Court of Nebraska.

Petitioner is merely seeking another hearing in this court which is obviously for the purpose of rehearing only.

NATURE AND STATEMENT OF THE CASE

Petitioner, Albert Smith, filed a petition in the District Court of Lancaster County to secure his release from the Nebraska State Penitentiary by means of a writ of habeas corpus. At the time, he was being held in the penitentiary by virtue of a commitment issued out of the District Court of Valley County, Nebraska.

A copy of the Information and Judgment in and of the District Court of Valley County, Nebraska, pursuant to which petitioner was committed, was attached to and made a part of the petition filed by petitioner in the District Court of Lancaster County, Nebraska, praying for the writ of habeas corpus. It reads as follows:

INFORMATION—COUNTY ATTORNEY

State of Nebraska, } ss.
County of Valley, }

In the District Court of the Eleventh Judicial District of Nebraska, in and for Valley County.

THE STATE OF NEBRASKA, *Plaintiff*, vs. ALBERT SMITH *Defendant* } INFORMATION—Burglary with Explosives,—Section 28-543.

BE IT REMEMBERED, That George A. Munn, County Attorney in and for Valley County, and in the Eleventh Judicial District of the State of Nebraska, who prosecutes in the name and by authority of the State of Nebraska, comes here in person, into Court at this, the September 27 term, A. D. 1932, thereof, and for the State of Nebraska gives the Court to understand and be informed that Albert Smith late of the county aforesaid, did on the Fifteenth day of September, A. D., 1932, in the County of Valley and State of Nebraska aforesaid, then and there being, did then and there wilfully, unlawfully, feloniously, burglariously, maliciously and forcibly break and enter into the Chicago, Burlington & Quincy Railroad Company, a corporation, station house depot building in the city of Ord, Valley County, Nebraska, and did then and there wilfully, unlawfully, feloniously and maliciously by the use of explosive commonly called nitroglycerine or soup forcibly explode and break open a safe there situated with the intent and accomplished purpose then and there wilfully, unlawfully, feloniously, burglariously and maliciously to injure said safe, the property of the Railway Express Agency, Inc., a corporation, and to steal take and carry away from said building and safe the goods and chattels of the said Chicago, Burlington & Quincy Railroad Company, a corporation, and Railway Express Agency, Inc., a corporation, without the

consent and against the will of the said Chicago, Burlington & Quincy Railroad Company, a corporation, and Railway Express Agency, Inc., a corporation, the respective owners thereof—Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Nebraska.

(S) George A. Munn
George A. Munn,
County Attorney.

STATE OF NEBRASKA, }
COUNTY OF VALLEY, } ss.

I, _____ Sheriff in and for Valley County, Nebraska, do hereby certify that on the _____ day of _____, A. D. 19_____ in the county aforesaid, I served a true and certified copy of the within information on the herein Defendant _____ _____ by delivering to him personally a true and certified copy of said information with all endorsements thereon.

Dated at Ord, Nebraska, in said county this _____ day of _____, A. D., 19_____.

_____
Sheriff.

STATE OF NEBRASKA, }
COUNTY OF VALLEY, } ss.

George A. Munn, being first duly sworn, upon his oath says that he is the County Attorney in and for Valley County, in the Eleventh Judicial District of the State of Nebraska, and that the allegations and charges against the defendant Albert Smith in the within information

are true as he verily believes.

George A. Munn
County Attorney.

Subscribed in my presence and sworn to before me, this *Twenty-seventh* day of *September,* A. D., 1932.

Alfred A. Wiegardt,
(Seal) Clerk of the District Court.
(S) Alfred A. Wiegardt

IN THE DISTRICT COURT OF VALLEY COUNTY, NEBRASKA.

THE STATE OF NEBRASKA,
Plaintiff,
vs.
ALBERT SMITH,
Defendant
} JOURNAL ENTRY

Now on this 27th day of September, 1932, the above entitled action came on for hearing upon the Information filed herein by the County Attorney in and for the County of Valley, State of Nebraska.

The Plaintiff, THE STATE OF NEBRASKA, being represented in open Court by George A. Munn, County Attorney, and the Defendant, ALBERT SMITH, being present in person in Open Court. Trial had.

Defendant appearing in Court and waives preliminary examination and asks that he be arraigned at once.

Thereupon the Defendant was duly and legally arraigned and plead "Guilty" to the Information as charged.

IT IS THEREFORE CONSIDERED AND ADJUDGED that the Defendant, Albert Smith, be taken to the Nebraska Penitentiary at Lancaster, Nebraska, and

there confined at hard labor, Sundays and Holidays excepted, for a period of Twenty Years and that he pay the costs of this action. Solitary Confinement forms no part of this Sentence.

BY THE COURT,
(S) Edwin P. Clements
Judge of the District Court.

An examination of the petition for the writ of habeas corpus held insufficient by the District Court of Lancaster County reveals that the material allegations therein are as follows:

"I

Your petitioner contends and alleges that he was deprived of his constitutional right to know the nature and cause of the accusation for which he was to answer, and that he was deprived of a copy thereof in writing, all of which is provided by Chapter 29-1802 of the Compiled Statutes of the State of Nebraska for 1929, and by Article I Section 11 of the Constitution of the State of Nebraska, and by the Sixth Amendment to the Constitution of the United States.

"II

Your petitioner contends and alleges that he was deprived of his constitutional right to have the assistance of competent legal counsel to aid and advise him, all of which is provided by Chapter 29-1803 of the Compiled Statutes of Nebraska for 1929, and by Article I Section 11 of the Constitution of the State of Nebraska, and by the Sixth Amendment to the Constitution of the United States.

"III

Your petitioner further contends and alleges that he did not waive the fundamental constitutional rights of which he was deprived as shown in the first and second preceding allegations of this petition, namely, (1) to know the nature and cause of the accusation for which he was to answer, or to receive a copy thereof in writing; and (2) to the assistance of competent legal counsel.

"IV

Your petitioner further contends and alleges that the judgment as pronounced by the trial court, and as shown by your petitioner's "Exhibit A," is void and a legal nullity and was rendered contrary to and in violation of Chapters 29-2201 and 29-2202 of the Compiled Statutes of Nebraska for 1929, in that it does not show a conviction by a jury or a finding of guilt by the trial court.

The Lancaster County District Court dismissed the petition for a writ of habeas corpus, and petitioner appealed to the Supreme Court of Nebraska, which, on June 3, 1940, affirmed the judgment.

It is perfectly clear that the provisions of the Nebraska State Constitution and of the Nebraska Statutes constitute the sole basis of the petitioner's present application for a writ of certiorari.

It is equally clear that it is primarily the province of the Supreme Court of Nebraska to interpret the Constitution and Statutes of its own State.

It is finally clear that if petitioner is to succeed in his present application for a writ of certiorari the burden is

upon him to show that the Constitution and Statutes of Nebraska as interpreted by the Supreme Court of that State, are, any or all of them, repugnant to the Constitution of the United States.

SUMMARY OF POINTS AND ARGUMENT

Point A.—On an application for a writ of habeas corpus, errors or irregularities in the criminal trial, not jurisdictional, will not be considered.

Point B.—No court may by writ of habeas corpus properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of cause or person or some matter rendering the proceeding void.

Point C.—A criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution and conducted to the settled course of judicial proceedings as established by the law of the state, is due process of law in the sense of U. S. Constitution, 14th Amendment, so long as it includes notice and a hearing or an opportunity to be heard before a court of competent jurisdiction, according to established modes of procedure.

Point D.—This court will not review and revise the construction affixed to a state statute as to a question of local law by the court of last resort of the state.

Point E.—The writ of habeas corpus will not issue unless the averments of the petition, taken as true, show probable cause, and a prima facie case for relief.

Point F.—Petition herein for a writ of certiorari should be denied as it fails to show any error in the proceedings under which petitioner was convicted.

Point G.—Petition herein for a writ of certiorari should be denied as it fails to show that if any error was committed in the proceedings, such error was jurisdictional or such as to render the judgement of conviction void.

Point H.—Petition herein for a writ of certiorari should be denied as it fails to show that any rights of petitioner under the Constitution or laws of the United States have been impaired.

Point I.—Petition herein for a writ of certiorari should be denied as none of the authorities cited by petitioner in his supporting brief sustains his claim for a writ.

ARGUMENT

Point A

On an application for a writ of habeas corpus, errors or irregularities in the criminal trial, not jurisdictional, will not be considered.

This point has been repeatedly decided by both the Supreme Court of Nebraska and by this court. *In re John Fanton*, 55 Neb. 703, 76 N. W. 447; *Hulbert v. Fenton*, 115 Neb. 818, 215 N. W. 104; *Alexander v. O'Grady*, 290 N. W. 718; *Hawk v. O'Grady*, 290 N. W. 911; *Frank v. Mangum*, 237 U. S. 309; *Keize v. Henry*, 211 U. S. 146, 29 Sup. Ct. 41, 53 L. Ed. 125; *In re Lewis*, 114 Fed. 963; *In re Wood*, 140 U. S. 278, 11 Sup. Ct. 738; *McElvaine v. Brush*, 142 U. S. 155, 12 Sup. Ct. 156, 35 L. Ed. 971; *In re Frederich*, 149 U. S. 70, 13 Sup. Ct. 793, 37 L. Ed. 653; *Wight v. Nicholson*, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. Ed. 865; *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118.

Point B

No court may by writ of habeas corpus properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of cause or person or some matter rendering the proceeding void.

This proposition is merely an amplification of Point A. It is sustained by the authorities quoted under that point, *supra*.

Point C

A criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, is due process of law in the sense of U. S. Constitution, 14th Amendment, so long as it includes notice and a hearing or an opportunity to be heard before a court of competent jurisdiction, according to established modes of procedure.

Some of the numerous authorities supporting this proposition are: *Frank v. Mangum*, 237 U. S. 309, *Ex parte Royall*, 117 U. S. 241, 251, 29 L. Ed. 868, 871, 6 Sup. Ct. Rep. 734; *In re Frederich*, 149 U. S. 70, 77, 37 L. Ed. 653, 657, 13 Sup. Ct. Rep. 793; *Whitten v. Tomlinson*, 160 U. S. 231, 242, 40 L. Ed. 406, 412 16 Sup. Ct. Rep. 297; *Baker v. Grice*, 169 U. S. 284, 291, 42 L. Ed. 748, 18 Sup. Ct. Rep. 323; *Tinsley v. Anderson*, 171 U. S. 101, 105, 43 L. Ed. 91, 96, 18 Sup. Ct. Rep. 805; *Markuson v. Boucher*, 175 U. S. 184, 44 L. Ed. 124, 20 Sup. Ct. Rep. 76; *Urquhart v. Brown*, 205 U. S. 179, 51 L. Ed. 760, 27 Sup. Ct. Rep. 459.

Point C as set forth above is the verbatim language of paragraph two (2) of the syllabus in the case of *Frank*

v. Mangum. Excerpts from the opinion of Mr. Justice Pitney are as follows:

> "It is indeed settled by repeated decisions of this court that where it is made to appear to a court of the United States that an applicant for habeas corpus in the custody of a state officer in the ordinary course of a criminal prosecution, under a law of the state not in itself repugnant to the Federal Constitution, the writ, in the absence of very special circumstances, ought not to be issued until the state prosecution has reached its conclusion, and not even then until the Federal questions arising upon the record have been brought before this court upon writ of error."

(Quoting with approval what was said in *Covell v. Heyman,* 111 U. S. 176, 182, 28 L. Ed. 390, 392, 4 Sup. Ct. Rep. 355, a case of conflict of jurisdiction):

> 'The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity.'

> "It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent juris-

diction cannot afterwards be disputed between the same parties."

Point D

This court will not review and revise the construction affixed to a state statute as to a question of local law by the court of last resort of the state.

The language of this court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, is as follows:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

And in *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202, 82 L. Ed. 1290, this court said:

> "The decision in *Erie R. Co. v. Tompkins* * * * settles the question of power. The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court."

In the case at bar, petitioner complains of alleged errors committed by the Supreme Court of Nebraska in affirming the judgment of the District Court of Lancaster County, dismissing petitioner's application for a writ of habeas corpus. The alleged errors are that the court failed to hold that the judgment and sentence rendered and imposed by the District Court of Valley County against and upon petitioner, was void as being in contravention of Article I, Section 11 of the Constitution of Nebraska and Chapters 29-1802, 29-1803, 29-2201 and 29-2202 of the Compiled Sta-

tutes of Nebraska for 1929, and as being violative of the Sixth Amendment to the United States Constitution.

As petitioner is mistaken in his belief that the Sixth Amendment to the United States Constitution is involved, and as the Supreme Court of Nebraska has interpreted the Nebraska Constitution and Statutory provisions relied upon adversely to petitioner, it is plain that if the petitioner is to succeed in his present application for a writ of certiorari he must show that the Constitution and laws of Nebraska as interpreted by the Supreme Court of that State are repugnant to the 14th Amendment of the Federal Constitution. In the remaining points of this brief it will be demonstrated that petitioner has completely failed to make such a showing either in his application for a writ of habeas corpus, or in his present application for a writ of certiorari.

Point E.

The writ of habeas corpus will not issue unless the averments of the petition, taken as true, show probable cause, and a prima face case for relief.

The language of *Frank v. Mangum, supra*, on this point is as follows:

> "It was the duty of the court to refuse the writ if it appeared from the petition itself that appellant was not entitled to it," citing *Ex parte Watkins*, 3 Pet. 193, 201, 7 L. Ed. 650, 652; *Ex parte Milligan*, 4 Wall. 2, 110, 18 L. Ed. 281, 292; *Ex parte Terry*, 128 U. S. 289, 301, 32 L. Ed. 405, 407, 9 Sup. Ct. Rep. 77.

Point F.

Petition herein for a writ of certiorari should be denied as it fails to show any error in the proceedings under which petitioner was convicted.

Petitioner's first contention that the judgment and and sentence herein did not comply with Article I, Section 11 of the Constitution of Nebraska and Chapter 29-1802 of the Compiled Statutes of Nebraska, for 1929.

Section 11 of Article I of the Nebraska Constitution insofar as here applicable reads as follows:

> "In all criminal prosecutions the accused shall have the right. . . . . to demand the nature and cause of accusation, and to have a copy thereof. . . . ."

Chapter 29-1802 C. S. Neb. 1929 insofar as here applicable reads as follows:

> ". . . . . Within twenty-four hours after the filing of an indictment for felony, and in every other case on request, the clerk shall make and deliver to the sheriff, the defendant or his counsel a copy of the indictment, and the sheriff on receiving such copy shall serve the same upon the defendant, and no one shall be, without his assent, arraigned or called on to answer to any indictment until one day shall have elapsed, after receiving in person or by counsel, or having an opportunity to receive a copy of such indictment as aforesaid."

The Journal Entry in the District Court of Valley County pleaded by petitioner in his application for a writ of habeas corpus (Page 5 *supra*) reads, in part:

> "Now on this 27th day of September, 1932, the above entitled action came on for hearing upon the Information filed herein by the County Attorney in and for the County of Valley, State of Nebraska.
>
> The Plaintiff, THE STATE OF NEBRASKA, being represented in open Court by George A. Munn,

County Attorney, and the Defendant, ALBERT SMITH, being present in person in Open Court. Trial had.

Defendant appearing in Court and waives preliminary examination and asks that he be arraigned at once.

Thereupon the Defendant was duly and legally arraigned and plead "Guilty" to the Information charged."

Accordingly, petitioner does not contend that he was at no time informed of the charge filed against him, nor does he contend that the charge to which he pleaded guilty was misread at the time of arraignment; he contends that it was read in language unintelligible to him. He does not deny that he pleaded guilty to the charge as read to him; he does not contend that he was innocent of the crime described in the information as actually read to him; he contends that he "understood" that he was to be charged "merely" with "Common Burglary." We have then the case of a man who tacitly admits his guilt of the crime for which he was convicted seeking to escape the consequences of his felonious act on the technical ground, *inter alia*, that a copy of the information was not served upon him as "required" by the Constitutional and Statutory provisions set out above.

With respect to the necessity of serving a copy of the information on the defendant under these provisions the Supreme Court of Nebraska has held:

"Under section 436 of the Criminal Code, the defendant was entitled, as a matter of right, to a copy of the amended information, and one day in which to pre-

pare for trial . . . . . But these are rights accorded him by the Statute, which he could waive, and the presumption is that he has done so, since it does not appear that any objection was made in the District Court to proceeding to trial because of a want of compliance with the above Statutory command." *Barker v. State*, 54 Neb. 53, 74 N. W. 427.

"An information was filed with the Clerk of the District Court charging that F. had committed a felony, and the same day he plead "not guilty." A copy of said information was not delivered to F., but thereafter he procured an order of the court for compulsory attendance of witnesses and permission to take depositions. Three months later a jury was impaneled and sworn in said case, and, after the state had called a witness and propounded three questions, F. for the first time objeted that he had not been furnished a copy of said information. *Held*, that the Court did not err in overruling said objection." *Foster v. State*, 83 Neb. 264, 119 N. W. 475.

It will be observed that in the above two cases the Supreme Court of Nebraska held that the right of the accused to a copy of the information was subject to waiver even under a plea of "not guilty"—in which case the accused asserts his innocence. Surley, the provisions relied upon by petitioner can hardly be regarded as "mandatory" in cases where the accused has entered a plea of "guilty." Indeed, in the latter case, the Supreme Court of Nebraska has repeatedly held that:

"A person charged with crime may, by a judicial confession of guilt, waive all the rights secured to him by Section 11, Article I of the Constitution (of Nebras-

ka)." *McCarty v. Hopkins,* 61 Neb. 550, 85 N. W. 540; *Alexander v. O'Grady,* 290 N. W. 718; *Davis v. O'Grady,* 291 N. W. 82.

With respect to the corresponding guarantees in the Sixth Amendment to the Federal Constitution, this court has expressed itself as follows:

> "A plea of guilty to an indictment, whatever may be the grade of the crime, will be received and acted upon if it is made clearly to appear that the natural effects of it are understood by the accused." *Patton v. U. S.,* 281 U. S. 276, 74 L. Ed. 854, 50 Sup. Ct. 253.

Counsel for respondent do not understand this court to have implied in the above language that an accused who receives a heavier sentence than he anticipated after a plea of guilt should thereafter be permitted to assert that he did not understand "the natural effects" of his plea.

Petitioner does not and can not cite any decision either by this court or by the Supreme Court of Nebraska to the effect that the above quotations do not correctly state the law. He cites the case of *State v. Robertson,* 55 Neb. 41, 75 N. W. 37 as authority for the proposition: "This pleading the statute denominates either an indictment, information or complaint. A copy of this pleading in felony cases must be served upon the accused. It is to this that he must plead, and it is upon the allegations of this pleading that a judgment convicting him of having committed the offense charged must stand or fall."

In order that this court may obtain a glimpse at the outset of the kind of authorities petitioner cites throughout his brief, the appropriate portion of the syllabus by the court in the case of *State v. Robertson, supra,* is here set out:

"1. Section 256 of the Criminal Code construed, and *held*, that the filing of a complaint before an examining magistrate charging a person with the commission of a crime, causing him to be arrested, examined, and bound over to the District Court, does not arrest the running of the Statute of Limitations, unless the magistrate before whom the complaint was filed had jurisdiction to try and punish the accused for the offense with which he was charged."

In short, the case deals with the Statute of Limitations and has no bearing whatever on the present action. The sentences quoted by petitioner from the above opinion should be seen by this court in their context:

"It is not the pleading on which the State's Prosecution is based and to which the accused must plead and on which he must be tried. If a Grand Jury should indict A. on the tenth day of a month, and this indictment should not be returned and filed in court until the fifteenth of the month, we think the running of the statute would be arrested on the fifteenth, and not on the tenth; for until the indictment has been brought into court and filed, as provided by Section 410 of the Code of Criminal Procedure, it cannot be said that the indictment has been found nor that the state has begun the prosecution of the accused. The state, like a private individual, must commence its action by the filing in a court having jurisdiction to try and determine the action a pleading in which it charges the accused with having committed a certain crime at a time and place mentioned. This pleading the statute denominates either an indictment, infomation, or complaint. A copy of this pleading in felony cases must be

served upon the accused. It is to this that he must plead . . . . ."

Respondent cannot resist the temptation to suggest that petitioner must do more than rely upon a causual remark in an unrelated case if he hopes to prevail in his present contention.

Petitioner of course has the burden to show that the interpretations stated, by the Supreme Court of Nebraska, of the Constitution and Statutes of its own State, are repugnant to the Fourteenth Amendment to the Federal Constitution. In an effort to discharge this burden he cites and quotes from the case of *Snyder v. Massachusetts,* 291 U. S. 97. The quotation he gives is as follows: "The commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental . . . What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it."

With the quotation given, respondent, of course, has no quarrel whatever. Indeed, that quotation exactly states the position taken by counsel for the respondent in this entire series of briefs in answer to the epidemic of applications for the writ of certiorari addressed to this court during the past several weeks by inmates of the Nebraska Penitentiary. However, how utterly inapplicable the *Snyder* case is to the one at bar is apparent at once from the following excerpts from the opinion of Mr. Justice Cardozo:

"At the trial and on appeal Snyder made the claim that through the refusal of the trial judge to permit him to be present at a view there had been a

denial of due process of law under the Fourteenth Amendment of the United States."

"Counsel for Snyder moved that his client be permitted to view the scene with the jury, invoking the protection of the Federal Constitution."

"The question in this court is whether a view in the absence of a defendant who has made demand that he be present is a denial of due process under the Fourteenth Amendment."

"The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. Consistently with that Amendment, trial by jury may be abolished . . . . Indictments by a Grand Jury may give way to informations by a Public Officer . . . . The privilege against self incrimination may be withdrawn and the accused put upon the stand as a witness for the state . . . What may not be taken away is notice of the charge and adequate opportunity to be heard in defense."

Obviously the entire case could be cited by the respondent as an excellent exposition of his own attitude. In the *Snyder* case this court held that there was *no error* in the proceedings below. Petitioner plainly is relying upon a casual remark, in itself beyond the possibility of dispute, as authority for his contention that the notice required in

criminal prosecutions by the Fourteenth Amendment of the Federal Constitution must be of a certain kind, i. e. by service of a copy of the information upon the accused whether he pleads guilty or not. Needless to say, there is nothing persuasive in his logic and the authorities he cites merely betray the weakness of his position.

Petitioner's second contention that the judgment and sentence herein did not comply with Article I, *Section* 11 *of the Constitution of Nebraska and Chapter* 29-1803 *of the Compiled Statutes of Nebraska* 1929.

Section 11 of Article I of the Nebraska Constitution insofar as here applicable reads as follows:

> "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel . . . . ."

Chapter 29-1803 C. S. Neb. 1929 insofar as here applicable reads as follows:

> "The court before whom any person shall be indicted for any offense which is capital, or punished by imprisonment in the Penitenitary, is hereby authorized and required to assign to such person counsel not exceeding two, if the prisoner has not the ability to procure counsel, and they shall have full access to the prisoner at all reasonable hours . . . . ."

Concerning these provisions petitioner contends: "The above quoted statute of Nebraska is mandatory in its nature and is necessary because of the requirements of Article I, Section 11 of the Constitution of Nebraska and the Sixth Amendment of the Constitution of the United States."

It is noteworthy that petitioner is able to cite not a single authority to support his interpretation that "the

Statute is mandatory." On the contrary, the Supreme Court of Nebraska has recently twice held that the right of the accused to have the assistance of counsel for his defense is waived by a judicial confession of guilt. *Alexander v. O'Grady*, 290 N. W. 718; *Davis v. O'Grady*, 291 N. W. 82.

As pointed out above (under petitioner's first claim of error), the Supreme Court of Nebraska has repeatedly held that:

> "A person charged with crime may, by a judicial confession of guilt, waive all the rights secured to him by Section 11, Article I of the Constitution (of Nebraska)." *McCarty v. Hopkins*, 61 Neb. 550, 85 N. W. 540; *Alexander v. O'Grady*, 290 N. W. 718; *Davis v. O'Grady*, 290 N. W. 82, and the cases cited therein.

Petitioner seems to argue that these decisions by the Supreme Court of Nebraska are not in harmony with the decisions of this court in *Powell v. Alabama*, 287 U. S. 45; *Johnson v. Zerbst*, 304 U. S. 458.

In *Powell v. Alabama, supra*, the facts as found by this Court were as follows:

> "The petitioners, hereinafter referred to as defendants, are negroes charged with the crime of rape, committed upon the persons of two white girls. The crime is said to have been committed on March 25, 1931. The indictment was returned in a state court of first instance on March 31, and the record recites that on the same day the defendants were arraigned and entered pleas of *not guilty* (Italics supplied). There is a further recital to the effect that upon the arraignment they were represented by counsel. But no counsel had been employed, and aside from a statement made by the trial judge several days later during a

colloquy immediately preceding the trial, the record does not disclose when, or under what circumstances, an appointment of counsel was made, or who was appointed. During the colloquy referred to, the trial judge, in response to a question, said that he had appointed all the members of the bar for the purpose of arraigning the defendants and then of course anticipated that the members of the bar would continue to help the defendants if no counsel appeared. Upon the argument here both sides accepted that as a correct statement of the facts concerning the matter.

"There was severance upon the request of the state, and the defendants were tried in three several groups, as indicated above. As each of the first three cases was called for trial, each defendant was arraigned, and, having the indictment read to him, entered a plea of not guilty. Whether the original arraignment and pleas were regarded as ineffective is not shown. Each of the three trials was completed within a single day."

This court held, in that case:

"In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process."

Powell v. Alabama can be distinguished from the present case on several points. It is enough, however, to point out that in the Powell case the defendant entered a plea of *not guilty*. In the case at bar, the petitioner pleaded *guilty* to the information filed against him. Petitioner does not, and and cannot, cite any case decided by this court or any other court wherein it was held that an accused was unconstitutionally deprived of his right to assistance by counsel after entering a plea of guilty to the charge, unless perhaps under statutes which compel the court to reject a plea of guilty when entered.

In *Johnson v. Zerbst, supra*, the facts as found by this court were as follows:

> "Petitioner and one Bridewell were arrested in Charleston, S. C., November 21, 1934, charged with feloniously uttering and passing four counterfeit twenty-dollar Federal Reserve notes and possessing twenty-one such notes. Both were then enlisted men in the United States Marine Corps, on leave. They were bound over to await action of the United States Grand Jury, but were kept in jail due to inability to give bail. January 21, 1935, they were indicted; January 23, 1935, they were taken to court and there first given notice of the indictment; immediately were arraigned, tried, convicted, and sentenced that day to four and one-half years in the penitentiary; and January 25 were transported to the Federal Penitentiary in Atlanta. While counsel had represented them in the preliminary hearings before the commissioner in which they—some two months before their trial—were bound over to the Grand Jury, the accused were unable to employ counsel for their trial. *Upon*

arraignment, both pleaded not guilty, said that they had no lawyer, and—in response to an inquiry of the court—stated that they were ready for trial. They were then tried, convicted, and sentenced, without assistance of counsel" (Italics supplied).

This court held in that case:

> "Petitioner was convicted without enjoying the assistance of counsel. Believing habeas corpus was not an available remedy, the District Court made no findings as to waiver by petitioner. In this state of the record we deem it necessary to remand the cause. If—on remand— the District Court finds from all of the evidence that petitioner has sustained the burden of proof resting upon him and that he did not competently and intelligently waive his right to counsel, it will follow that the trial court did not have jurisdiction to proceed to judgment and conviction of petitioner, and he will therefore be entitled to have his petition granted. If petitioner fails to sustain this burden, he is not entitled to the writ."

Johnson v. Zerbst can again be distinguished from the present case on several vital points. It is enough, however, to again point out that in the Johnson case the defendant entered a plea of *not guilty*. In the case at bar, the petitioner pleaded *guilty* to the information filed against him.

In support of his present contention petitioner also relies upon the case of *Brown v. Mississippi*, 279 U. S. 278, and *Grosjean v. American Press Company*, 297 U. S. 233, 56 Sup. Ct. 444. The holding by this court in the *Brown* case is that "use of confession obtained by coercion and brutality as basis for conviction and sentence could not be justified on ground that State had the right to withdraw privilege a-

gainst self-incrimination." That in the *Grosjean* case is that "a State Statute imposing license tax for privilege of engaging in business of selling advertising upon all publishers of newspapers or magazines having weekly-circulation of more than 20,000 copies *held* unconstitutional under due process of law clause of 14th Amendment because it abridges the freedom of the press." Neither case has any bearing on the present action.

Petitioner also cites the *Grosjean* case in support of his contention that the statement made by respondent in previous briefs to the effect that "It is elementary learning that the 6th Amendment to the Federal Constitution does not guarantee procedure in criminal prosecutions in the courts of the several states" will not "hold water." Paragraph 5 of the syllabus in that case reads: "States are precluded from abridging freedom of speech or of the press, not by the 1st Amendment, but by the due process clause of the 14th Amendment." Respondent does not, and did not at any time, deny that some of the provisions of the Federal Bill of Rights are included in the concept of "due process"; respondent contends that the rights claimed by the petitioner herein and his *confreres* are definitely *not* included in that concept.

Petitioner's third contention that the judgment and sentence herein did not comply with Sections 29-2201 *and* 29-2202 *of the Compiled Statutes of Nebraska for* 1929.

The sections referred to read as follows:

> "29-2201. Before the sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, and asked whether he has anything to say why judgment should not be passed against him."

"29-2202. If the defendant have nothing to say, or if he show no good and sufficient cause why judgment should not be pronounced, the court shall proceed to pronounce judgment as provided by law."

In view of the admitted facts that petitioner pleaded guilty and that neither trial nor verdict by jury was had, petitioner's present contention can only be described as frivolous. If petitioner is to be understood as claiming that the Journal Entry of his conviction and sentence is in some vague way incomplete, perhaps the following quotation from the syllabus by the court in the case of *Taylor v. State*, 86 Neb. 795, 126 N. W. 752, may clear up the difficulty:

"9. Where the record fails to show affirmatively that the court, before passing sentence upon the defendant, informed him that a verdict of guilty had been found against him, as required by Section 495 of the Criminal Code, and in the absence of any showing in the record to the contrary, the fact that such information was given will be presumed."

Petitioner' fourth contention that the judgment and sentence herein did not comply with Section 27-317 of the Compiled Statutes of Nebraska for 1929.

That portion of the Section referred to which petitioner quotes and upon which he relies reads as follows:

"27-317. A judge of the District Court may sit at chambers anywhere within his district and upon ten days' notice to the adverse party or his attorney of record, shall have power to: . . . . .Tenth. Receive a plea of 'guilty' from any person charged with a felony and pass sentence thereon, upon ten days' notice to the prosecuting attorney . . . . ."

It will be observed that petitioner does not contend that his plea of guilt was accepted and sentence thereon passed in vacation. The record shows, and petitioner does not deny, that these things happened in term time. Petitioner seems to feel that because the session in which these things happened was held in a "small room" (in the Court House) the court was exercising "jurisdiction in chambers." However, if respondent were to concede *arguendo* the truth of even this extraordinary proposition, it is still impossible to understand how petitioner can contend that the Section quoted was violated. He seems to interpret the Section as requiring ten days' notice to both the accused and the prosecuting attorney before the acceptance of a plea of guilt and sentence thereon. For this strange interpretation of the Statute petitioner can of course cite no authority. Just why an accused should have ten days' notice of his own plea of guilt he does not explain. Respondent could of course even concede to petitioner his interpretation of the Statutes and rely upon the doctrine of waivers, express or implied; but why continue the discussion further? It should amply suffice merely to quote the following provisions of the Nebraska Constitution and Statutes:

> "Article 5, Section 9 Const. Neb. The District Courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the legislature may provide; and the judges thereof may admit persons charged with felony to a plea of guilty and pass such sentence as may be prescribed by law."

> "Section 27-302, C. S. Neb. 1929. The District Courts shall have and exercise general, original and appeallate jurisdiction in all matters, both civil and criminal, except where otherwise provided."

In an attempt to give the Sections just quoted a curiously rigid construction, petitioner quotes the language of *State ex rel. Lang v. Civil Court of Milwaukee County*, 280 N. W. 347, at page 349, that: "Statutory powers conferred upon a court of inferior jurisdiction must be exercised and executed in substantially the manner prescribed by the Statute, or the judgment will be void." Suffice it to say that the case dealt with a bastardy proceeding in the Civil Court of Milwaukee County, i. e., with a purely statutory proceeding in a court of inferior jurisdiction. Respondent will not bore this tribunal with an attempt to point out the difference between courts of general and inferior jurisdiction, between judicial power as exercised at common law and as created purely by Statute.

In this same connection, petitioner cites the case of Ex parte "Bollinan" (Bollman), 4 Cranch 93, to the effect that: "Courts which are created by written law and whose jurisdiction is defined by written law cannot transcend that jurisdiction." To this propposition respondent offers no objection. He feels that he might briefly point out that this court *held* in that caes that it had the power "to issue the writ of habeas corpus ad subjiciendum," despite the fact that it found neither express constitutional nor express statutory grant of power to issue the same. The case could here be cited by the respondent.

Petitioner's fifth contention that the judgment and sentence herein did not comply with the 14th Amendment to the Federal Constitution in that the Journal Entry of his conviction and sentence failed to show any waiver other than that of preliminary examination.

Here petitioner relies entirely upon the following quotation from the opinion of Mr. Justice Black in the case of *Johnson v. Zerbst, supra*:

> "The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without Counsel. This protecting Duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

Petitioner, it seems, would distort the language of this court above to mean: (a) That it is a procedural error to neglect to record a defendant's waivers; (b) That such procedural error would deprive the Court of Jurisdiction; and (c) That (a) and (b) are true even where the accused pleads guilty. Respondent does not so understand the meaning of the court.

Point G

Petition herein for a writ of certiorari should be denied as it fails to show that if any error was committed in the proceedings, such error was jurisdictional or such as to render the judgment of conviction void.

The discussion under Point F, *supra*, is applicable here, a *fortiori*.

Point H

Petition herein for a writ of certiorari should be denied as it fails to show that any rights of petitioner under the Constitution or laws of the United States have been impaired.

In the case of *Frank v. Mangum* the court said:

> "Repeated decisions of this court have put it beyond the range of further debate that the 'due Process' clause of the 14th Amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal, are not interferred with," citing *Hurtado v. California,* 110 U. S. 516, 532, 538, 28 L. Ed. 232, 237, 239, 4 Sup. Ct. Rep. 111 292; *Lem Woon v. Oregon* 229 U. S. 586, 589, 57 L. Ed. 1340, 1341, 33 Sup. Ct. Rep. 783, and cases cited.

The burden is on the petitioner to show wherein the form or mode of procedure adopted by the District Court of Valley County deprived him of an essential right or rights of notice or hearing or opportunity to be heard before a competent tribunal. The application for a writ of habeas corpus wholly fails to show any such deprivation.

Point I

Petition herein for a writ of certiorari should be denied as none of the authorities cited by petitioner in his supporting brief sustains his claim for a writ.

The authorities relied upon by petitioner will be considered in the order in which they are cited in his supporting brief: *Frank v. Mangum,* 237 U. S. 309. This case has

several times been cited for the respondent in this brief. It is sufficient to quote a portion of the last paragraph of the syllabus to show that it is no authority for the petitioner whatever:

> "The petitioner in this case was not denied due process of law in the conduct of his trial by the Courts of first instance or appellate . . . . ."

Snyder v. Massachusetts, 291 U. S. 97, 54 Sup. Ct. Rep. 330. This case was discussed *supra* under Point F (Petitioner's First Contention).

Powell v. Alabama, 287 U. S. 45, 53 Sp. Ct. Rep. 55. Discussed *supra* under Point F (Petitioner's Second Contention).

Johnson v. Zerbst, 304 U. S. 458, 58 Sup. Ct. Rep. 1019. Discussed *supra* under Point F (Petitioner's Second Contention).

Strauder v. West Virgina, 100 U. S. 303. This case involved the validity of a federal statute providing for the removal from state courts to the federal courts of causes where defendants were unable to enforce their rights as citizens of the United States. This court held the statute constitutional. The case has no bearing on the present action.

Neal v. Delaware, 103 U. S. 370. The following paragraph from the syllabus sufficiently indicates the nature of the case:

> "The exclusion, because of their race and color, of citizens of African descent from the grand jury that found, and from the petit jury that was summoned to try, the indictment, if made by the jury commissioners, without authority derived from the Constitu-

tion and laws of the State, was a violation of the prisoner's rights, under the Constitution and laws of the United States, which the trial court was bound to redress; and the remedy for any failure in that respect is ultimately in this court upon writ of error."

Brown v. Missippi, 297, U. S. 278. The holding in this case is that "use of confession obtained by coercion and brutality as basis for conviction and sentence could not be justified on ground that State had the right to withdraw privilege against self-incrimination." The case has no bearing on the present action.

Patton v. United States, 281 U. S. 276, 50 Sup. Ct. Rep. 253. The holding in this case is indicated by the following paragraphs from the syllabus (N. B. The plea was *not guilty*):

"6. Granting person accused of serious crime right to waive jury trial held not against public policy, notwithstanding common-rule law forbidding waiver.

The conditions existing at the time of the common-law rule, which prevented the accused from waiving his right to trial by jury, no longer exist, so that the maxim forbidding application of rule founded on a particular reason when the reason has ceased to exist is applicable."

"7. Right of accused to waive trial by jury extends to both misdemeanors and felonies."

"8. Before accused's waiver of jury can become effective, consent of government counsel and court must be had in addition to express and intelligent consent of defendant."

Grosjean v. American Press Company, 297 U. S. 233, 56 Sup. Ct. 444. Discussed *supra* under Point F (Petitioner's Second Contention).

Garland v. Washington, 232 U. S. 642, 34 Sup. Ct. 456. The complete syllabus reads:

> "A conviction upon a second and amended information after a prior conviction under the original information had been set aside and a new trial granted was not wanting in the due process of law guaranteed by U. S. Const., 14th Amend., because no arraignment or plea was had upon the second information, where, without raising that specific objection before trial, the accused had made certain objections to such information, and was put to a trial thereon before a jury in all respects as though he had entered a formal plea of not guilty."

The case could be, and hereby is, cited for the respondent.

Mooney v. Holohan, 294 U. S. 103, 55 Sup. Ct. Rep. 340. The syllabus reads, in part, as follows:

> "Requirement of 'due Process' is not satisfied by mere notice and hearing if state, through prosecuting officers acting on state's behalf, has contrived conviction through pretense of trial which in truth is used as means of depriving defendant of liberty through deliberate deception of court and jury by presentation of testimony known to be perjured, and in such case state's failure to afford corrective judicial process to remedy the wrong when discovered by reasonable diligence would constitution deprivation of liberty without due process."

As a matter of fact, petitioner's application to this Court for leave to file petition for an original writ of habeas corpus was in the above case denied. However, with respect to the above proposition, upon which petitioner in the case at bar apparently relies, it should be sufficient to point out that no claim is made in the present action that petitioner was convicted through the deliberate use of perjured testimony, through deliberate deception of Court and Jury, or through mere pretense of trial—the factual basis for the language of this Court in the Mooney case. In the case at bar the plea was "guilty."

State v. Robertson, 55 Neb. 41, 75 N. W. 37. Discussed *supra* under Point F (Petitioner's First Contention).

Ex parte "Bollinan" (Bollman), 4 Cranch 93. Discussed *supra* under Point F (Petitioner's Fourth Contention).

State ex rel. Lang v. Civil Court of Milwaukee County, 280 N. W. 347. Discussed *supra* under Point F (Petitioner's Fourth Contention).

Duncan v. Missouri, 152 U. S. 377, 14 Sup. Ct. Rep. 570. The syllabus reads:

> "1. After the amendment of 1890 to the constitution of Missouri, providing for the separation of the supreme court of the state into two divisions for the transaction of business, and for the transfer of any cause involving a federal question to the full court for decision, a conviction for a murder, committed before such amendment, was affirmed by one division of the court, and an application to it for a rehearing was denied, no reference to any federal question being made. Thereafter defendant moved for a transfer to the full court, on the ground that the amendment,

as applied to an offense committed before its adoption, violated the constitution of the United States. Held, that the constitutional right was not specially set up or claimed at such time, and in such way as to give jurisdiction to the supreme court of the United States to review a denial of the motion.".

"2. It seems that such amendment of the state constitution was not within the constitutional inhibition against ex post facto laws, because it conferred jurisdiction of the cause upon a division of the court less in numbers and different in personnel from the court as organized when the crime was committed."

The case has no bearing on the present action.

DeJonge v. Oregon, 229 U. S. 353, 57 Sup. Ct. 255. The following paragraph in the syllabus sufficiently indicates the nature of the case:

"9. Oregon Criminal Syndicalism Law, as applied to member of Communist Party convicted for assisting in conducting meeting called under auspices of party, regardless of what was said or done at meeting, *held* unconstitutional as repugnant to due process clause of Fourteenth Amendment, since, irrespective of objectives of party, member still enjoyed personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by Communist Party."

The case has no bearing on the present action.

Rogers v. Peck, 199 U. S. 425. The syllabus of the case reads as follows:

"The Governor of Vermont has ample power to grant reprieves to persons sentenced to death for murder. It is only where fundamental rights, specially secured by the Federal Constitution, are invaded that the Federal courts will interfere with a State in the administration of its law for the prosecution of crime, and it will not be presumed that if the freedom of a person properly convicted of murder and sentenced to death is improperly restricted that the state authorities will not afford the necessary relief. Federal courts will not, by writs of *habeas corpus*, reverse the proceedings of state courts while acting within their jurisdiction under statutes which do not conflict with the Federal Constitution, and the decision of the state court that it is not necessary for the court to refix the day for execution of a person already sentenced by the court and reprieved by the Governor, where the reprieve definitely sets the day, is one wholly within state practice and is not controlled by Federal Constitution or laws. Due process of law, guaranteed by the Fourteenth Amendment, does not require the State to adopt a particular form of procedure, so long as the accused has had sufficient notice and adequate opportunity to defend himself in the prosecution, and the State may determine, free from Federal interference or control in what courts crime may be prosecuted and by what courts the prosecutions may be reviewed. Statutes should be given a reasonable construction with a view to make effectual the legislative intent; and the granting by the Governor of a State of a reprieve to a person sentenced to death in order that an appeal may be heard in this court, from an order of the District Court dismissing a petition in

habeas corpus proceedings, is not such an interference by state authorities in a proceeding in the Federal courts in violation of ss 766, Rev. Stat., as will make the subsequent confinement and execution of the prisoner a deprivation of liberty or life without due process of law."

The case has no bearing on the present action.

Herbert v. Louisiana, 272 U. S. 312, 47 Sup.. Ct. Rep. 103. The nature of the case is sufficiently indicated by the following paragraphs from the syllabus:

"1. Under Const. U. S. Amend. 18, prosecution for same act of manufacturing intoxicating liquor in both federal and state courts does not constitute double jeopardy."

"6. Alleged misconstruction of state statute as to punishment by state Supreme Court *held* not to operate as denial of due process of law under Fourteenth Amendment, since construction of state statutes is for decision of state courts."

The case is hereby cited for the respondent.

In re Nielsen, 131 U. S. 176. The syllabus reads:

"A conviction making it unlawful for a man to cohabit with more than one woman in any territory of the United States bars a prosecution prescribing the punishment for adultery," under certain circumstances. "If the District Court improperly sustain a demurrer to a plea of such former conviction, the defendant may be released from imprisonment *** by habeas corpus, as the court had no authority to render the judgment."

The case involved double jeopardy, and has no bearing on the present action.

Moore v. Dempsey, 261 U. S. 86, 43 Sup. Ct. Rep. 265. The syllabus reads:

> "A petition for writ of habeas corpus, which alleged that the trial at which petitioners were convicted of murder and sentenced to death was held when public feeling growing out of a race riot was high, that the petitioners were represented by an attorney appointed by the court at the beginning of the trial, which lasted only three-quarters of an hour, that the denial of a motion for new trial based on those facts was affirmed by the highest court of the state, and the state chancery court prohibited from entertaining an application for habeas corpus, is sufficient as against demurrer to show that petitioners were being deprived of their lives without due process of law, so as to entitle them to a hearing in a federal court."

Like *Alabama v. Powell, supra,* and *Johnson v. Zerbst, supra,* there are vital differences between the case cited and the one at bar. Again it should be sufficient to point out that in the *Moore* case, the defendants pleaded not guilty.

Ex parte Resler, 115 Neb. 335, 212 N. W. 765. In this case the Supreme Court of Nebraska held: "It appearing that, as to charge contained in the complaint, jeopardy attached by virtue of the former trial, and it appearing from the admitted facts of the record that the charge contained in the complaint on which the petitioner is now being detained and imprisoned by respondent is one upon which jeopardy attached by virtue of the former trial * * * Petitioner discharged." The case at bar does not involve double jeopardy.

Herndon v. Lowry, 301 U. S. 242, 57 Sup. Ct. Rep. 732. The nature of the case is sufficiently indicated by the following paragraph in the syllabus:

> "If state statute penalizes innocent participation in a meeting held with an innocent purpose, merely because the meeting was held under the auspices of an organization, membership in which, or the advocacy of whose principles is also denounced as criminal, the law so construed and applied goes beyond the power to restrict abuses of freedom of speech and arbitrarily denies that freedom."

The case has no bearing on the present action.

In re Medley, 134 U. S. 160. This case involved a peculiar situation wherein a statute of Colorado provided for solitary confinement in capital cases. The statute repealed all former acts in conflict with it. Medley was sentenced under the repealing statute for an act committed before it could legally take effect. It was held that the act imposed a greater punishment than the acts repealed, and was ex post facto as to crimes committed before it went into effect. The court held that the sentence was void and that the petitioner should be released on habeas corpus. The court acknowledged in the opinion that this result was deplorable and attempted to meliorate its decision by "authorizing the court to dispose of the party as law and justice require, order the warden of the penitentiary to notify the Attorney General of the state in which he is held before discharging him." There were two dissenting opinions. The case has no bearing on the present action.

CONCLUSION

We respectfully submit that the petition filed in the District Court of Lancaster County, praying for a writ of

habeas corpus did not state a cause of action, and that the decisions to that effect by the Lancaster Court and the Supreme Court of Nebraska are not here open to question because the record shows:

1. That questions only of state law were raised;

2. That the decisions of the Supreme Court of Nebraska upon such questions are all adverse to the petitioner;

3. That no remote federal question is involved;

4. That no constitutional rights of the petitioner have in any way been impaired;

5. That no question of peculiar gravity or of national importance or consequence is involved;

6. That the petitioner has been able to cite not a single authority, federal, Nebraska, or otherwise that supports his right either to a writ of habeas corpus or of certiorari.

We submit that this case is not a proper one for review by certiorari in this court and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 364.—October Term, 1940.

Albert Smith, Petitioner,
vs.
Joseph O'Grady, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska.

On Writ of Certiorari to the Supreme Court of the State of Nebraska.

[February 17, 1941.]

Mr. Justice Black delivered the opinion of the Court.

The question presented is whether petitioner's application for writ of habeas corpus filed in a Nebraska state court alleged facts which if proven entitled him to release from prison because he was held pursuant to a court judgment rendered in violation of rights guaranteed him by the federal Constitution. The trial court declined to issue the writ, holding that the petition failed to state a cause of action justifying the relief prayed. Without requiring the state to answer and without giving petitioner an opportunity to prove his allegations, the application was dismissed. A motion for reconsideration, setting out additional facts, was similarly dismissed. On appeal, the Supreme Court of Nebraska affirmed, without opinion.

The judgment of the Nebraska Supreme Court is a final and authoritative answer to petitioner's contention that his imprisonment was illegal under the state's constitution or laws. But petitioner also contended that his imprisonment was illegal under the federal Constitution. And in denying the writ the Nebraska court necessarily held that petitioner's allegations—even if proven in their entirety—would not entitle him to habeas corpus, even if the petition showed a deprivation of federally protected rights.[1] It was to review this question that we granted certiorari. 311 U. S. —.

[1] It is suggested that the Nebraska Supreme Court's final judgment of affirmance rested on petitioner's failure to file a printed brief in that court, and that this was an adequate non-federal ground, precluding our review of the federal question raised. But this contention is obviously not sound, because the Supreme Court denied petitioner's motion for relief from the rule requiring printed briefs solely on the ground that upon examination of the whole record the court had found the appeal to be without merit.

But before examining the pleadings in order to determine whether the allegations showed a deprivation of federally protected rights, it is necessary to consider a preliminary contention urged by the state. The tenor of this contention is that under Nebraska law petitioner could not have his asserted federal rights determined in habeas corpus proceedings. And, supporting this contention, there is in the record a letter to petitioner from the trial judge who originally denied the writ—a letter indicating that petitioner's only relief from illegal imprisonment was by application to the Nebraska Parole and Pardon Board. This letter is not, however, a judicial determination, and apparently no state statutes or court decisions compel the result it indicates. Nor can we lightly assume that Nebraska affords no corrective process for one who is imprisoned under a judgment rendered in violation of rights protected by the federal Constitution. That Constitution is the supreme law of the land, and "Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution."[2] Moreover, while the opinions of the Nebraska courts do not mark clearly the exact boundaries within which Nebraska confines the historic remedy of habeas corpus, the Nebraska Supreme Court has held that the writ was properly invoked to obtain release from imprisonment resulting from deprivation of constitutional rights.[3] Because of this, and because a contrary conclusion would apparently mean that Nebraska provides no judicial remedy whatsoever for petitioner even though he can show he is imprisoned in violation of procedural safeguards commanded by the federal Constitution,[4] we are unable to reach the conclusion that habeas corpus is unavailable to him under Nebraska law.

It is therefore our duty to examine petitioner's allegations in order to determine whether they show that his imprisonment is the result of a deprivation of rights guaranteed him by the federal Constitution. The heart of his charge is that he, an ignorant lay-

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[2] Mooney *v.* Holohan, 294 U. S. 103, 113.

[3] In re Resler, 115 Neb. 335, 338-340. And see Kuwitzky *v.* O'Grady, 135 Neb. 466, 468. Cf. Darling *v.* Fenton, 120 Neb. 829.

[4] See Newcomb *v.* State, 129 Neb. 69.

man not represented by counsel, was tricked into pleading guilty to a serious offense. Among the specific allegations are:

Petitioner, without being informed of the charges against him, was arrested in one county, and then removed to another county for two days. There he was told he was wanted for burglary in a third county (Valley County), but would be dealt with leniently if he would plead guilty. After a long distance telephone conversation between petitioner and a man identified as the prosecuting attorney of Valley County, a conversation arranged and listened to by the Valley County sheriff, a sentence of not over three years was agreed upon. Petitioner was soon thereafter transferred to the Valley County jail. His efforts to get copies of the charges filed against him were unsuccessful, the sheriff telling him that this was "not necessary" since "everything had been 'fixed.'" After three days in the Valley County jail, and "without ever having had a copy of the charge", petitioner was taken before a trial judge, "summarily arraigned, and, upon his prearranged plea of guilty, sentenced, to his surprise and consternation, to a term of twenty years imprisonment in the Nebraska State Penitentiary." Petitioner, an uneducated layman, had no knowledge of law or legal procedure, and had never before been arrested or been in a court room for any purpose whatsoever. Upon imposition of the twenty year sentence, however, he vigorously protested, asked the court and the prosecuting attorney for a copy of the charge to which he had pleaded guilty, and, this request being refused, asked permission to withdraw his plea of guilty, requested appointment of an attorney to advise and assist him, and asked that he be given a proper opportunity to defend himself. All of these requests were refused by the court, and "within the hour" he was on his way to the penitentiary, accompanied by the sheriff. After arriving at the penitentiary he discovered "that he had been duped and inveigled into entering a plea of guilty to a charge of burglary with explosives . . . ," punishable in Nebraska by twenty years to life imprisonment. Simple burglary, to which petitioner agreed to plead guilty, upon condition that he be sentenced to three years, carries a penalty of one to ten years. During the eight years petitioner has been in the penitentiary, he has done everything an uneducated person could do to bring his illegal im-

prisonment to the attention of the Nebraska authorities, but has not been able to get counsel because of lack of funds. His appeals to the Board of Pardons have been futile. Because of his ignorance of his rights, and because of the trial court's failure to appoint, and his inability to obtain, counsel, the original sentence was not appealed.

These allegations, if true, undermine and invalidate the judgment upon which petitioner's imprisonment rests. The circumstances under which petitioner asserts he was entrapped and imprisoned in the penitentiary are wholly irreconcilable with the constitutional safeguards of due process. For his petition presents a picture of a defendant, without counsel, bewildered by court processes strange and unfamiliar to him, and inveigled by false statements of state law enforcement officers into entering a plea of guilty. The petitioner charged that he had been denied any real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process; that because of deception by the state's representatives he had pleaded guilty to a charge punishable by twenty years to life imprisonment; that his request for the benefit and advice of counsel had been denied by the court; and that he had been rushed to the penitentiary where his ignorance, confinement and poverty had precluded the possibility of his securing counsel in order to challenge the procedure by regular processes of appeal. If these things happened, petitioner is imprisoned under a judgment invalid because obtained in violation of procedural guaranties protected against state invasion through the Fourteenth Amendment.[5] The state court erroneously decided that the petition stated no cause of action. If petitioner can prove his allegations the judgment upon which his imprisonment rests was rendered in violation of due process and cannot stand.

Reversed and remanded.

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[5] Cf. Walker *v.* Johnston, No. 173 this Term, decided February 10, 1941; Johnson *v.* Zerbst, 304 U. S. 458; Mooney *v.* Holohan, 294 U. S. 103. And see Chambers *v.* Florida, 309 U. S. 227.